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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	))	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	))	MM Docket No. 87-7
	))	
To the Commission:	)	

COMMENTS OF BLADE COMMUNICATIONS, INC.

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SUMMARY OF ARGUMENT

Blade supports the Comments of the Local Station Operators Coalition, in opposition to restrictive changes in Commission ownership and attribution rules, except to the extent they are inconsistent with these Comments.

To the extent the Commission modified its rules to require attribution of LMAs to a broker, Blade urges the Commission to fully grandfather existing LMAs to permit their renewal and transfer. Blade also urges the Commission to permit UHF/UHF combinations within a market.

Television LMAs have produced tangible public interest benefits. Those benefits are epitomized by the LMA between Blade's Television Station WDRB, Louisville, Kentucky, and Television Station WFTE, Salem, Indiana. The oft-renewed construction permit for WFTE was due to expire, with no prospect of actual station operation, when negotiations with WDRB produced agreements for the station's construction and operation. As a direct consequence of those arrangements and WDRB's technical expertise, WFTE was constructed at substantial expense and began operations in approximately four months. WDRB's participation has enabled WFTE to acquire and broadcast substantial, popular programming, including programming specifically oriented to the station's Indiana community of license. In short, because of the LMA, WFTE is able to compete in the marketplace as an established station, not a shaky shoestring start-up operation.

A Commission failure to fully grandfather existing LMAs like the WDRB-WFTE LMA would jeopardize tangible public interest benefits. Penalizing entities like WDRB and WFTE that entered into LMAs in good faith, reasonable reliance on an existing regulatory structure would also be unfair and contrary to judicial requirements:

-- the case is not one of first impression, as the Commission has in the past adopted many new restrictions on ownership and relationships between stations;

-- a failure to grandfather would be a departure from consistent past Commission actions grandfathering nonconforming existing interests when new ownership rules were adopted;

-- parties that entered into LMAs relied in good faith on an existing regulatory environment;

-- failure to grandfather would burden both parties to existing LMAs and the viewing public that has benefitted from them; and

-- there is no statutory interest in a failure to grandfather -- to the contrary, Congress has expressly directed the Commission to grandfather existing LMAs.

A Commission failure to fully grandfather existing LMAs by allowing their renewal and transfer would disregard Congress' express contrary direction and disserve the public interest by depriving viewers and the marketplace of LMAs' clear tangible benefits. The public interest demands full grandfathering of existing LMAs.

The public interest also supports an exception to any modified television duopoly rule that, at a minimum, permits combinations involving UHF stations. The UHF handicap continues to be a fact of television life, which will not disappear until the laws of physics can be changed. Although cable provides some assistance in overcoming the disparity with VHF service and audience acceptance, it is of limited utility and may no longer be available if must-carry requirements are overturned.

A limited exception to a modified television duopoly rule to permit UHF/UHF combinations will facilitate diversity and promote competition by permitting weak market participants to enhance their programming and competitive capabilities without adversely affecting competition in the marketplace: as a practical matter, two commonly-owned UHF stations will not be in a position to dominate a local media market.

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COMMENTS OF BLADE COMMUNICATIONS, INC.

Blade Communications, Inc. ["Blade"], by its attorneys, submits these Comments in response to the Commission's Second Further Notice of Proposed Rule Making in the above-captioned proceedings.[1]

Introduction

Blade is a member of the Local Station Operators Coalition ["LSOC"], an informal coalition of local television broadcast licensees and associations that seeks a meaningful

1/ Review of the Commission's Regulations Governing Television Broadcasting, Second Further Notice of Proposed Rule Making, MM Dockets Nos. 91-221, et al., FCC 96-438 (Nov. 7, 1996) ["Second Notice"]. This proceeding is one of three concurrently-adopted interrelated proceedings involving possible changes in Commission ownership and attribution rules. Broadcast Television National Ownership Rules, Notice of Proposed Rule Making, MM Dockets Nos. 96-222, et al., FCC 96-437 (Nov. 7, 1996) ["National Ownership Notice"]; Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Further Notice of Proposed Rule Making, MM Dockets Nos 94-150 et al., FCC 96-436 (Nov. 7, 1996) ["Attribution Further Notice"].

relaxation of the television duopoly rule.[2] Blade supports and has subscribed to the majority of LSOC's Comments herein, and urges the Commission to:

-- amend the duopoly rule to define a station's market as its DMA, eliminating use of service contours for that purpose;

-- permit common ownership of two television stations in the same market (DMA) if one of the stations is a UHF station; and

-- if the Commission permits common ownership of stations in the same market only via waiver, it should at a minimum

    -- grant waivers if one of the stations is a UHF station and there is no bona fide and compelling showing that such ownership would be inconsistent with the public interest;

    -- consider all media voices in administering any waiver policy that includes a minimum voice test;

    -- require no more than four remaining independently-owned broadcast television station voices in any minimum voice test;

    -- not restrict waivers to failed or failing stations; and

    -- grant waivers of the duopoly rule to permit common ownership of two VHF stations in the same market only in compelling circumstances.

With respect to LMAs, LSOC and Blade urge the Commission to

-- permanently grandfather all existing LMAs, and permit their renewal and transfer; and

-- continue to allow LMAs regardless of changes in its attribution and ownership rules.[3]

2/ 47 C.F.R. § 73.3555(b) (1996).

3/ To the extent Blade's position differs from that set forth in the LSOC Comments, these Comments represent Blade's views.

These separate Comments reflect Blade's status as the corporate parent of three UHF stations,[4/] one of which is a participant in an LMA. In particular, WDRB is party to agreements including an LMA with Kentuckiana Broadcasting, Inc., licensee of Television Station WFTE, Salem, Indiana ["WFTE"]. But for WDRB's commitment of its expertise, experience and financial resources through its LMA, it is clear that:

-- WFTE might never have been built or, at the very least, not for many years;

-- WFTE would not have been able, as a start-up UHF station, to provide its viewers with the current schedule of high quality programming;

-- WFTE probably would not have been built with the best, state-of-the-art equipment available; and

-- WFTE would not have been capable of providing the community of Salem, Indiana with its only licensed television station.

Blade's experience as a successful UHF broadcaster and as a participant in a successful LMA that has furthered the public interest in new television service makes it uniquely qualified to comment on certain issues raised by the Second Notice. In particular, Blade urges the Commission to (1) grandfather and allow the full renewal and transfer of existing LMAs; and (2) relax its television duopoly rule at least to permit common ownership of two UHF stations in the same market.

4/ Blade is the corporate parent of Lima Communications Corp., licensee of Television Station WLIO-TV, channel 35, Lima, Ohio; WLFI-TV, Inc., licensee of Television Station WLFI-TV, channel 18, Lafayette, Indiana; and Independence Television Company, licensee of Television Station WDRB, channel 41, Louisville, Kentucky ["WDRB"]. It is also the corporate parent of Idaho Independent Television, Inc., licensee of Television Station KTRV, channel 12, Nampa, Idaho.

Contemporary Market Conditions Support Changes in Commission Ownership Restrictions

The Second Notice marks the third time in less than five years that the Commission has solicited comments looking toward possible relaxation of its three-decade-old television duopoly rule.[5] It is restating the obvious to recite the vast differences between the television industry of 1964 when the rule was adopted[6] and the multichannel video marketplace of 1997.[7] It is stating the obvious to observe that it is high time for the Commission to acknowledge those changes by modifying the antiquated television duopoly and related rules to place television on a more level playing field with its multichannel media competitors.

Recent actions highlight the inequity of continuing to burden local television stations with outdated ownership limitations while competitors flourish without similar restrictions. Congress and the Commission have permitted expanded common ownership of local radio stations.[8] There are minimal limits on national cable system ownership and on the number of

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5/ See Review of the Commission's Regulations Governing Television Broadcasting, Notice of Proposed Rulemaking, MM Docket No. 91-221, 7 FCC Rcd 4111(1992) ["Notice"]; Further Notice of Proposed Rule Making, 10 FCC Rcd 3524 (1995) ["Further Notice"]. These rulemaking proceedings were preceded by a Notice of Inquiry, 6 FCC Rcd 4961 (1991) ["NOI"], which in turn was a response to a staff report, F. Setzer and J. Levy, Broadcast Television in a Multichannel Marketplace, FCC Office of Plans and Policy, Working Paper No. 26, 6 FCC Rcd 3996 (1991) ["OPP Working Paper"].

6/ Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 FCC 1476, recon. granted in part, 3 RR 2d 1554 (1964).

7/ LSOC's Comments document the extensive diversity and competition that characterize the contemporary communications marketplace; that showing need not be replicated here.

8/ Revision of Radio Rules and Policies, Report and Order, MM Docket No. 91-140, 7 FCC Rcd 2755, recons., 7 FCC Rcd 6387 (1992); Implementation of Sections 202(a) and subscribers which a cable system may serve in a community in a region.[9/] There are no limits on DBS ownership. Telephone companies may provide video services within their service areas.[10/]

Local television stations, however, continue to be restricted by decades-old ownership restrictions that impair their ability to compete effectively with other video program providers that enjoy the added advantage of multiple channels. As their competitors continue to gain alternative avenues for program and service delivery, television stations, limited to a single one-lane road to the home, will be left abandoned beside the information superhighway unless they are free to optimize the economies of scale and operational efficiencies that more liberal ownership regulations would permit.

Commission decisions now routinely rely on today's ever-increasing media diversity and competition in waiving ownership restrictions specific markets.[11/] This anecdotal recognition of modern marketplace conditions should receive tangible across-the-board application through the realistic modifications of Commission television ownership restrictions that LSOC and Blade advocate. As LSOC demonstrates, the ownership rule changes it proposes are modest

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202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership), 11 FCC Rcd 12368 (1996).

9/ Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order, 8 FCC Rcd 3359 (1993).

10/ Telecommunications Act of 1996, 47 U.S.C. §§ 651, 653; see Bell Atlantic-New Jersey, Inc. Certification to Operate an Open Video System, 11 FCC Rcd 13249 (1996).

11/ See, e.g., Stockholders of Infinity Broadcasting Corporation, FCC 96-495 (Dec. 26, 1996); Stockholders of CBS Inc., 11 FCC Rcd 3733 (1995).

modifications that are clearly appropriate and necessary to preserve television's role in an increasingly competitive and diverse media market.

At a minimum, Blade urges the Commission to permanently grandfather existing television LMAs under any new LMA attribution and ownership rules, permitting their unrestricted renewal and transfer. Blade further urges the Commission to change its television duopoly rule at least to the extent of permitting common ownership of two UHF stations in a market. Both of these rule modifications are critically necessary to preserving high quality television service and would further long-recognized public interest goals.

Existing LMAs Must be Grandfathered

The Second Notice defers issues relating to the attribution of LMAs to its companion proceeding involving a broadbased review of its attribution rules. It does, however, solicit comments concerning the appropriate treatment of existing LMAs if it confirms its tentative conclusion that stations operated pursuant to LMAs should be attributed to the broker. If the Commission should adopt LMA attribution standards, Blade urges the Commission to grandfather existing LMAs, permit them to be renewed according to their terms and allow them to be transferred.

Benefits of LMAs

Congress has expressly praised LMAs' public interest benefits. The Conference Report on the Telecommunications Act of 1996 expressly referenced LMAs' "positive contributions,"[12/] and the House Committee Report on that legislation also noted that "[t]he efficiencies gained

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12/ S. Conf. Rep. 104-230, 104th Cong., 2d Sess. 164 (1996).

through these agreements have reaped substantial rewards for both competition and diversity, enabling stations to go on the air which would not otherwise be able to obtain financing, and saving failing stations which would otherwise go dark."[13] The Commission, too, has long recognized LMAs' significant public interest benefits. Even as it began to regulate radio LMAs, the agency acknowledged that

> the various operational joint venture arrangements described in the Notice generally strengthen the radio service that the public receives by providing stations that are not commonly owned with economies similar to those available to commonly owned stations. Such arrangements are generally beneficial to the industry and listening audience because they enable stations to pool resources and reduce operating expenses without necessarily threatening competition or diversity.[14]

It likewise recognized that LMAs "can provide competitive and diversity benefits to both the brokering parties and to the public."[15] WDRB's experience confirms the accuracy of these Commission conclusions.

WFTE(TV)

On August 27, 1987, Kentuckiana Broadcasting, Inc. was granted a construction permit for a new television station on channel 58 at Salem, Indiana. Although Kentuckiana anticipated that it would be able to construct and operate the station consistent with its application, market

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13/ H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 119 (July 24, 1995) ["House Report"].

14/ Revision of Radio Rules and Policies, Report and Order, MM Docket No. 91-140, 7 FCC Rcd 2755, 2787 (1992). The Commission's decision to regulate LMAs was driven not by a belief that they did not provide public interest benefits, but rather by fear that they could be used to circumvent the newly-relaxed ownership rules.

15/ Further Notice para. 135.

and financial pressures made this impossible. The applicant sought and was granted two extensions of its construction permit, but continued to be unable to obtain the financing necessary to commence construction. In light of the Commission's adoption of strict standards for evaluating applications for extension of construction permits, there was the very real probability that the Channel 58 permit would be cancelled by the Commission.

By late 1993, this possibility was becoming a near reality as it was highly unlikely that Kentuckiana would find the funds to build the station; the permittee was faced with loss of its unbuilt construction permit. Had that occurred, the channel would have become vacant, and even assuming that the DTV freeze would not apply, the prospect of multi-year lengthy application and comparative hearing processes made institution of television service in Salem and Southern Indiana but a distant possibility.

However, Kentuckiana and WDRB began discussions to explore ways that WDRB could apply its resources and extensive broadcast expertise and experience to implementing WFTE's construction permit. Those negotiations culminated on November 8, 1993, with a Construction Agreement whereunder WDRB and Kentuckiana would cooperate in constructing the station and putting it on the air, as well as a Time Brokerage Agreement whereunder WDRB would, subject to Kentuckiana's ultimate control and responsibility, provide programming and operational assistance to the station.[16/]

16/ The WDRB/WFTE LMA includes provisions like those required of radio LMAs, including requirements designed to ensure Kentuckiana's ultimate control over WFTE's programming, employment and financing.

A Quality Television Station

These arrangements have been extraordinarily successful in bringing high quality service to residents of Salem and the surrounding communities in Southern Indiana. As the direct result of WDRB's financial involvement and technical expertise, WFTE was constructed at a cost of over $2 million, resulting in a station that operates with first-class technical facilities. WFTE operates with superior technical facilities[17/] and provides its viewers with a signal of optimal quality, far better than the signal that might be expected of a new station built by inexperienced broadcasters. Indeed, the superior technical quality of the station's signal (as well as its popularity with the public) is reflected in its cable carriage throughout the Louisville marketplace.[18/]

WDRB's involvement also facilitated prompt institution of service. The station began operations in March of 1994, only four months after the LMA was signed (but well over six years after WFTE's initial construction permit was granted). In other words, once agreement was reached, Blade did not delay in bringing new service to the public, but rather acted promptly in adding to the diversity and competition in the Louisville television market.

17/ WDRB remodeled its transmitter building to accommodate WFTE's transmitter and refurbished and equipped a building to house WFTE's master control and administrative offices. Subject to WFTE's control, WDRB engineers planned and constructed the station. A WFTE equipment list is attached as Exhibit No. 1.

18/ A list of the cable systems carrying WFTE is attached as Exhibit No. 2. Despite the high quality of WFTE's signal, It is unlikely that the systems would be as willing to carry the station if it could no longer purchase the expensive and popular programming that it can purchase by virtue of the WDRB-WFTE LMA.

Superior Programming

Because of Blade's resources and expertise, WFTE was able to obtain high quality programming, far superior to the type of programming that a new startup UHF operation is usually able to afford. For example, WFTE carries popular -- and expensive -- programs such as "Cosby," "Martin," "COPS," and "Star Trek: Deep Space Nine." For the fall of 1997, WFTE has obtained long-term contracts for more popular programming, including a complete Star Trek package as well as "X-Files," "Walker Texas Ranger," "Living Single" and "Roseanne." It owns a large number of major film packages available to television broadcasters and is the only station in the market that regularly schedules feature films.

WFTE was also selected as an affiliate of the new UPN network. It carries approximately 25 hours per week of children's programming and in the fall of 1997 will add one hour of Disney animation on weekday afternoons as well as the new Captain Kangaroo program.

As the only Louisville market station licensed to an Indiana community, WFTE has made a special effort to provide programming of particular interest to southern Indiana residents. The station carries University of Indiana football and basketball games, as well as Big Ten football and basketball games and Notre Dame football games. It airs "Hoosier Millionaire," a program produced by the Indiana State lottery. WFTE also carries the Indiana high school football championship game and boys' and girls' high school basketball tournament games. WFTE broadcasts a golf show featuring Fuzzy Zoeller, a southern Indiana resident. Utilizing WDRB equipment, WFTE aired a town meeting live from Salem featuring Dan Coats, U. S. Senator from Indiana.

Increased Competitiveness

Because of the strength of its syndicated and local programming, WFTE is becoming a force in the highly competitive Louisville media market. Significantly, however, because both WDRB and WFTE are UHF stations in a market dominated by VHF affiliates of the three established networks, the two stations, even if their audience shares are combined, remain in the same market position that WDRB held prior to the LMA -- fourth. WFTE and WDRB combined have 14% of the Louisville DMA sign on to sign off audience, while their network competitors enjoy 18%, 19% and 20%, respectively.[19/]

Even when their revenues are combined, WFTE and WDRB do not dominate the marketplace: based on figures concerning Louisville television market revenues compiled by Ernst & Young, for the first six months of 1996 (the most recent available information) WFTE (3.2%) and WDRB (20.4%) together enjoyed approximately 23.6% of the $39.3 million total television market revenues (excluding religious and specialty stations), a revenue share that is far from the largest of the market's major stations and not significantly higher than WDRB's pre-LMA share of revenues. In fact, when compared with the estimated revenue shares for the other major Louisville stations, it is estimated that the WDRB/WFTE share places it 3rd or 4th among the stations.

In other words, notwithstanding the LMA's obvious contribution to diversity within the marketplace, there has been no adverse impact on competition. The LMA has not enabled

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19/ A.C. Nielsen, Inc., Louisville DMA, Total Household Share, 6 a.m. - 2 a.m. (November 1996).

WDRB to claim a new position of market dominance, but it has enabled WDRB and WFTE to add to market diversity and viewer choices, and remain strong competitors for the network VHF affiliates.

In other words, after facing extinction, WFTE has become a strong station, operated and programmed not like a new and struggling UHF station but rather like an established, experienced station. It has contributed to market diversity not only through its strong program schedule, but with a substantial amount of programming not provided by other market stations and specifically directed to its community of license. None of this would have occurred without the LMA with WDRB.

The Commission's proposal to require premature termination of existing LMAs would deprive the public of the tangible public service benefits that LMAs made possible and penalize entities like WDRB that reasonably relied on an existing regulatory scheme in taking risks to provide those benefits. A failure to accord full and permanent grandfathering to existing LMAs by allowing full implementation of all negotiated terms would disserve the public interest and be inequitable in the extreme. Entities like WDRB made substantial financial and other commitments -- including long-term program commitments -- in reliance on the Commission's regulatory scheme; the Commission should not punish their success by requiring such arrangements' artificially premature termination. Blade approached the LMA issue very cautiously and waited years before entering into the agreements with WFTE. During this period in the early 1990's, the Blade observed the development of television LMAs and analyzed the public statements of FCC Commissioners before concluding that such agreements were completely legal and proper. Retroactive LMA attribution would not only be unfair: it would also be contrary to existing constitutional and judicial requirements.

Retroactive Application

Section 551(4) of the Administrative Procedure Act defines a legislative rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[20/] Courts have emphasized that this provision requires administrative rules to be primarily concerned with the future rather than with past conduct.[21/] Retroactive rules are thus viewed with judicial suspicion and are subject to strict scrutiny because they interfere with the legally induced, settled expectations of private parties.[22/] The Supreme Court recognizes that "[t]he protection of reasonable reliance interests is not only a legitimate governmental objective; it provides an exceedingly persuasive justification."[23/] This Commission, too, has recognized that retroactive application of rules and procedures is inequitable and disruptive to business.[24/]

20/ 5 U.S.C. § 551(4) [emphasis supplied].

21/ See, e.g., American Express Co. v. U.S., 472 F.2d 1050 (C.C.P.A. 1973); Energy Consumers and Producers Ass'n v. Department of Energy, 632 F.2d 129 (Emer. Ct. App. 1980), cert. denied, 449 U.S. 832 (1980).

22/ Retroactive rules are not per se improper, E.L. Wiegand Div. v. NLRB, 650 F.2d 463 (3rd Cir. 1981), cert. denied, 455 U.S. 939 (1982).

23/ Heckler v. Mathews, 465 U.S. 728, 746 (1984).

24/ Cf., Amendments of Parts 20 and 24 of the Commission's Rules, 3 CR 433, 471 (1996); CATV of Rockford, Inc., 38 FCC 2d 10, 15 (1972), recons. denied, 40 FCC 2d 493 (1973).

A five-factor test has been used in determining whether a new rule being applied retroactively violates constitutional requirements:[25/] (1) whether the case is one of first impression; (2) whether the new rule is an abrupt departure from past practices or merely attempts to fill in a void in the law; (3) the extent of reliance on the former rule; (4) the burden retroactivity would impose; and (5) the statutory interest in applying the new rule despite reliance on the old one. The proposed failure to grandfather television LMAs cannot pass this test.

This is not a case of first impression and it would be a significant departure from past practice: the Commission has consistently grandfathered nonconforming existing interests when it adopted new ownership restrictions. See, e.g., Amendment of Part 76, Subpart J, of the Commission's Rules and Regulations, 53 FCC 2d 1102 (1975) [grandfathering broadcast-cable cross-ownership]; Second Report and Order, Docket No. 18110, 50 FCC 2d 1046, 1074 (1975) [grandfathering broadcast-newspaper cross-ownership]; Multiple Ownership Rules, 25 FCC 2d 318 (1970) [no divestiture required by new multiple ownership rules]; Multiple Ownership Rules, 3 RR 2d 1554 (1964) [existing combinations grandfathered notwithstanding adoption of new contour overlap standards]; First Report and Order, 40 RR 2d 23 (1977) [regional concentration of control rules include grandfathering provisions]; Multiple Ownership of Television Broadcast Stations, 5 RR 2d 1609 (1965) [Top 50 Market policy includes grandfathering provisions]. It has also grandfathered applicants and licensees not in compliance

25/ See, e.g., Retail, Wholesale and Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1971); Adelphia Cable Partners, 2 CR 76, 82 (1995).

with other types of newly-announced rules. See, e.g., Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, 3 FCC Rcd 5024, 5025 (1988) [grandfathering the location of public inspection files]; Deletion of Section 97.25(c) of the Amateur Rules, 66 FCC 2d 1 (1977) [grandfathering the right of a licensee to apply for the Amateur Extra Class license without examination]; see also Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Memorandum Opinion and Order, PP Docket No. 93-253, 75 RR 2d 833 (1994) [grandfathering applications on file by using lottery rather than auction procedures]; Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, 11 FCC Rcd 7824 (1996) [spectrum cap and cross-ownership rules to be applied prospectively only]. A failure to grandfather existing television LMAs would be a radical and unjustified departure from this longstanding practice.

Further, entities that entered into renewable LMAs relied completely on the lack of Commission regulation of such agreements. The WDRB-WFTE LMA, for example, was signed well in advance of any firm Commission proposal for regulation or restriction of such agreements. The Commission first specifically proposed to extend radio LMA regulation to television LMAs in its Further Notice, released on January 17, 1995, well over a year after the WDRB-WFTE LMA was signed and almost a year after WFTE began operations. Even then, the agency characterized its proposals as "tentative."[26/]

26/ The Commission has long held that institution of a rulemaking to consider changes in a rule or policy does not invalidate that rule or policy. Taft Broadcasting Company, 2 FCC Rcd 6622 (1987); Palm Beach Cable Television Co., 78 FCC 2d 1180, 1183 (1980);

In other words, WDRB, WFTE and numerous parties to other LMAs reasonably structured their business arrangements (including contractual provisions governing renewal and assignment), arranged financing and made other commitments based on the absence of Commission regulation or even specific plans therefor. The business arrangements that would be affected are not limited to the LMAs themselves: many entities, including WDRB, entered into long-term programming contracts. Absent grandfathering, much of that programming could not be aired, resulting in a substantial loss of investment and service to the public. In other words, it would be grossly inequitable for the Commission to require disruption of established business relationships entered into on reliance on an existing regulatory environment.[27/]

Retroactive LMA regulation by denying renewability and transferability would also impose significant burdens because stations that did not anticipate the need to assume full responsibility for station operations would be hard-pressed to make alternative plans for financing, programming, staffing and other operational requirements. Many if not most existing television LMAs (including the WDRB-WFTE LMA) involve an existing television station and a new or struggling UHF station. Often, the owners of stations subject to LMAs have been minority owners who lacked the expertise or resources necessary to institute successful television station operations. The assistance and experience of established station owners have

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Metromedia, Inc., 66 FCC 2d 566, 568 (1977). Entities like WDRB and others who entered into LMAs were thus entitled to rely on the lack of Commission regulation of their terms.

27/ The courts have long recognized that fairness and equity are dispositive in determining the acceptability of retroactive regulation. See, e.g., Helvering v. Griffiths, 318 U.S. 371, 402 (1943); NLRB v. E & B Brewing Co., 276 F.2d 594, 600 (2d Cir. 1960).

fostered new service that would otherwise not have been available to the public.[28] Entities that were willing to take the risks necessary to create this new service should not now be penalized for their success and contributions to the public.

If the support provided by the LMA is forcibly withdrawn, the likelihood is that circumstances will return to the status quo ante -- no service. In many cases, the brokered station could not survive without the benefits associated with the LMA. Plans were made based upon certain business assumptions, specifically including the renewability of the underlying business agreements. Stations that could not exist in the absence of an LMA in the past are unlikely to be able to do so in the future. Failure to respect agreements entered into in the absence of FCC regulations by prohibiting their renewal or transfer will inevitably result in diminution or loss of established service. Retroactive application of any new LMA attribution standards will, in short, burden both the public and affected private parties.

Finally, there is no statutory interest in applying the new rule. To the contrary, Congress expressly directed the Commission not to tamper with existing LMAs. Section 202(g) of the 1996 Act states that "[n]othing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission." This language is explained in the Conference Report accompanying the legislation:

28/ In the case of WDRB and WFTE, that service has included popular and expensive programs as well as programming uniquely responsive to the interests of a station's city of license outside of a major market community.

> [Section 202(g)] grandfathers LMAs currently in existence upon enactment of this legislation and allows LMAs in the future, consistent with the Commission's rules. The conferees note the positive contributions of television LMAs and this subsection assures that this legislation does not deprive the public of the benefits of existing LMAs that were otherwise in compliance with Commission regulations on the date of enactment.[29/]

Contrary to the Second Notice's strained interpretation of this language, the Joint Parties submit that Congress' intent that existing LMAs -- including renewal provisions -- be grandfathered could not be clearer. Federal agencies such as the Commission are precluded from issuing a rule that has a retroactive effect unless Congress has explicitly conferred the power to do so.[30/] Here, not only has Congress failed to give the Commission the power to retroactively apply its new LMA rules to prohibit grandfathering: it has expressly directed the agency not to do so.[31/]

There is absolutely nothing in the legislative history of Section 310(d) of the Communications Act of 1934, as amended, (or in the legislative history of Section 202[g]) supporting the Second Notice's claim that the former provision grants the Commission authority over LMAs and overrides Section 202(g)'s clear statutory mandate. Section 310(d) was enacted well before LMAs were a recognized industry concept and for a specific purpose -- to ensure that the Commission only review the qualifications of the assignee or transferee filing an application.

29/ S. Conf. Rep. 104-230, 104th Cong., 2d Sess. 164 (1996).

30/ Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988).

31/ It is black letter law that administrative agencies must obey the dictates of their enabling statutes. Civil Aeronautics Bd. v. Delta Air Lines, Inc., 367 U.S. 316, 322 (1961); United States v. Seatrain Lines, 329 U.S. 424, 432-33 (1947). For the Commission to fail to permanently grandfather existing LMAs would violate established judicial principles.

MMM Holdings, Inc., 4 FCC Rcd 6838, 6839 (1989) (noting that "the Commission's consideration under Section 310(d) of whether grant of the application will serve the public interest, convenience, and necessity properly focuses on the transferee's qualifications.") That provision says nothing about grandfathering particular ownership and attribution rules, and obviously does not preempt Section 202(g)'s express direction.

Failure to grandfather existing LMAs would retroactively apply new rules and requirements to the extreme disadvantage of parties' reasonable reliance interests. Not only would such action disserve the judicially-recognized legitimate government objective of protecting such interests: it would also disserve the public interest in enhanced television service and deprive the public of the Congressionally-recognized benefits of LMAs.

A Commission failure to fully grandfather existing LMAs by allowing their renewal and transfer would disregard Congress' express direction and disserve the public interest by depriving viewers and the marketplace of LMAs' acknowledged benefits. The public interest, in short, demands full grandfathering of existing LMAs.

The Commission Must Permit Common Ownership of Two UHF Stations in a Market

Any modified television duopoly rule must at a minimum include an exception for combinations involving UHF stations. The record in this proceeding is replete with documentation that UHF stations continue to operate under a significant practical handicap; additional statistical documentation of that well-recognized fact would be superfluous. See Second Notice para. 39; National Ownership Notice paras. 13, et seq.; Comments of the Association of Independent Television Stations, Inc., MM Docket No. 91-221 (May 17, 1995) at

24 - 29. WDRB and WFTE's experience is but one illustration of the handicap -- despite WDRB's affiliation with Fox and WFTE's strong schedule of attractive programming, the two stations *combined* still do not have an audience as large as any one of their VHF competitors.

UHF stations' service areas are generally not as large as those of VHF stations, reflecting the fact that UHF signals are more subject to terrain blockage than VHF signals.[32/] Eliminating the UHF handicap would require a change in the immutable laws of physics. Even if UHF stations can achieve signal quality comparable to their VHF competitors, they can do so only at substantial expense, disproportionately increasing the cost of effective competition.

Most UHF stations are not affiliated with major networks[33/] and, in addition to higher operational costs and smaller service areas, must bear the added economic burden of acquiring or developing all of their programming. UHF stations must also overcome audience perceptions and established viewing habits. Many UHF stations have been forced to seek a special market niche by adopting special formats, a choice which adds to diversity but, because of the smaller audience reached, reduces profitability. Cable carriage helps to some extent, but cable subscribership is not universal, and not all cable systems carry all UHF stations.[34/] Should

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32/ The reality of the resulting handicap is well recognized by broadcasters. See, e.g., Public TV Solution Not as Simple as V's, U's, BROADCASTING & CABLE, April 3, 1995, at 80.

33/ The recent series of network affiliation switches reflected a scramble to obtain VHF affiliates; those networks that obtained VHF affiliates reaped a tangible financial reward for their success. See, e.g., Perelman Didn't Mean to Start a Revolution, BROADCASTING & CABLE, April 17, 1995, at 49; The Mixed Bag of Affiliate Switches, BROADCASTING & CABLE, April 24, 1995, at 15.

34/ The Commission may take official notice of the fact that the vast majority of ADI modification decisions in which cable systems have sought to avoid mandatory carriage obligations have involved UHF stations. See, e.g., Catawba Services, Inc., 10 FCC Rcd 13130 television stations' mandatory cable carriage rights be eliminated,[35] UHF stations will suffer the most; many will not survive the economic chaos that could follow.

Congress has explicitly recognized the "technical and economic handicaps applicable to UHF facilities." House Report at 118. The House version of the Telecommunications Act of 1996 was thus designed to "create[] a strong presumption in favor of UHF/UHF and UHF/VHF combinations." Id. at 119. The Commission itself has acknowledged that combinations involving UHF stations "may provide relatively greater public interest benefits and impose relatively fewer public interest costs" than those involving VHF stations.[36] Such recognition has supported waivers of its one-to-a-market rules involving UHF television stations.[37]

The decision in this proceeding should comport with Congressional and prior Commission acknowledgment of UHF stations' inherent disadvantages. Both Congress and the Commission have consistently recognized the tangible public interest benefits that common ownership permits. UHF stations must be permitted to exploit these economic efficiencies in order to survive the increasingly cutthroat competition of today's video marketplace.

(1995); TKR Cable Company of Elizabeth, 10 FCC Rcd 13123 (1995); Tele-Media Company, 10 FCC Rcd 8615 (1995).

35/ National Ownership Notice para. 10 n. 25.

36/ Broadcast Multiple Ownership Rules, Second Report and Order, MM Docket No. 87-7, 4 FCC Rcd 1741, 1753 recons. granted in part, denied in part, 4 FCC Rcd 6489 (1989). The Commission's staff, too, has recognized that elimination of the duopoly rule for certain UHF stations would comport with the public interest. OPP Working Paper, supra; FCC NETWORK INQUIRY SPECIAL STAFF, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION 64 - 77 (1980).

37/ See, e.g., S.E. Licensee G.P., FCC 96-464 (November 27, 1996).